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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/612,549

07/02/2003

Marie Johansson

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05/10/2007

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EXAMINER

YU, GINA C

ART UNIT

PAPER NUMBER

1617

MAIL DATE

DELIVERY MODE

05/10/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/612,549	Applicant(s) JOHANSSON ET AL.	
	Examiner Gina C. Yu	Art Unit 1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 March 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 6-31 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 6-31 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>4/5/07</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on March 5, 2007 has been entered.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 6-29 are rejected under 35 U.S.C. 103(a) as being unpatentable by Laden et al. (WO 01/85103 A) in view of Flick (Cosmetic Additives: An Industrial Guide, 1991) and Zabotto et al. (US 4673526).

Laden et al. disclose anhydrous skin cleansers comprising water-immiscible emollient oil; oil-gelling agent; and emulsifying agent that forms an emulsion in situ on the skin when the skin cleanser is contacted. See abstract. The reference teaches that the skin cleanser gels form emulsions in situ on the skin during use that can be removed from the skin with water. See instant claim 6. The emollient oils of instant claims 7-14 and 18, including paraffin oil, petroleum jelly, lanolin oil, fish oils, sweet almond oils, palm oil, avocado oil, soybean oil, sunflower oil, coconut oil, jojoba oil, dimethicone, isopropyl myristate, isopropyl palmitate, octyl stearate, isocetyl stearate, decyl oleate are disclosed in p. 7, line 11 – p. 8, line 13. The emulsifying agents of

instant claim 16 are disclosed in p. 11, lines 1 –18. The oil-gelling agents of instant claims 27 are taught in p. 8, line 14 – p. 9, line 7. Example 1 also discloses a specific formula comprising glyceryl stearate and PEG-100 stearate (emulsifier), mineral oil (emollient), and fumed silica (oily gelling agent). See also Examples 2-10.

While Laden et al. do not explicitly disclose linoleic acid, myristic acid, palmitic acid, and stearic acid as recited by present claim 15, these fatty acids are inherently present in vegetable oils, particularly in almond oil and avocado oil. See Flick, p. 215.

While Laden et al. does not explicitly mention wax, the reference teaches using petrolatum jelly and C7-C18 aliphatic and aromatic alcohols, which include cetyl (C16) and stearyl (C18) alcohols. See p. 7, lines 24 – 30, p. 8, lines 14-16.

Zabotto et al. disclose anhydrous skin cleansing composition comprising an oil phase and an emulsifying agent. See abstract. Example 5 teaches a formulation comprising 6 % wt petroleum jelly and 2 % ozokerite wax; 14 % of HOSTAPHAT KW (emulsifier); and 68.4 % of petroleum jelly oil. See col. 2, line 31 – col. 3, line 62. See instant claims 6, 17-19. Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” See In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). In this case, claim 1 requires “no more than 10 weight %” of at least one emulsifying agent. Since the prior art teaches 14 % of emulsifier, the claimed amount of the emulsifier is within obvious range of the prior art for a skilled artisan to manipulate to discover an optimum weight amount. Similarly,

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while Zabotto teaches that the oil phase can generally contain oil and wax in ratio of 1:1 to 3:1, Example also exemplifies a specific formulation in Example 5 which comprises oil and wax which are in the obvious weight range from the claimed invention. The prior art amount of oil and wax are 25 wt % and 8 %, respectively, which are in close proximity to the claimed limitations. Examiner takes the position that a skilled artisan would have discovered, by routine experimentations, optimum weight amounts of oil, emulsifier, and wax that stabilize the composition, absent evidence to the contrary.

The oils of instant claims 7-14, including purcellin oil, sweet almond oil, avocado oil, dimethylpolysiloxane, etc., are disclosed in col. 2, lines 35 – 54. The waxes of instant claims 17-26 are disclosed in col. 2, line 61 – col. 3, line 28. The emulsifiers of instant claim 16 are also disclosed in col. 3, lines 43 – 62.

It would have been obvious to one of ordinary skill in the art at the time the present invention was made to modify the cleansing composition of Laden by mixing wax in the oil phase as motivated by Zabotto because 1) Laden teaches using cetyl and stearyl alcohols and petrolatum jelly in the oil phase of the cleanser gel; and 2) Zabotto also teaches that it is well known to use a mixture of oil and wax to make an emollient phase in formulating a skin cleansing composition. The skilled artisan would have had a reasonable expectation of successfully producing a stable, anhydrous skin cleanser with similar emolliency.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims

are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 6-31 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-18 of copending Application No. 10/406123. Although the conflicting claims are not identical, they are not patentably distinct from each other because both sets of claims are directed to compositions having overlapping limitations.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

Applicant's arguments filed on March 5, 2007, with respect to claims 6-29, have been fully considered but they are moot in view of the new grounds of rejection.

It is viewed obvious that the manipulation of the amount of oil and wax would affect viscosity of the fatty phase. Unexpected results of the claimed limitation is not seen in this case.

Conclusion

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 571-272-8605. The examiner can normally be reached on Monday through Friday, from 8:00AM until 5:30 PM..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Gina C. Yu
Patent Examiner